83-1999

SUPREME COURT OF THE UNITED STATES

October Term, 1983

SYDNEY M. EISENBERG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

SYDNEY M. EISENBERG
PETITIONER - PRO SE

1131 WEST STATE STREET
MILWAUKEE, WISCONSIN 53233
TELEPHONE: (414) 271-0931

QUESTIONS PRESENTED FOR REVIEW

1. Following the original trial during which Defendant presented no evidence because his attorneys believed no case had been presented against him, Defendant thereafter obtained new evidence which proved Petitioner was in no way guilty of the crime of signing a false return. Petitioner discovered a deposition taken by the IRS of Mabel Peterson, Chief Bookkeeper in the case, which proves that the IRS knew that the Defendant was innocent. This witness was hidden by the prosecution throughout the presentation of its case, without her ever being called as a witness, and the trial court was never advised that her statements would have cleared Defendant completely.

2. Does the taxpayer have a right to rely on IRS Rules and Regulations where they are pertinent to the specific case? In the instant case, pertinent IRS rules which require the IRS civil auditor to refrain from discussions about the case with IRS Intelligence, refer the case

to IRS Intelligence upon any indication of fraud and other rules were flagrantly violated. Can such serious violations be permitted without the Court taking notice of same and suppressing evidence obtained in violation of such rules?

3. Can an IRS revenue agent perjure himself on a material issue, fail to tell the truth about whom and which IRS Intelligence agents and supervisors he contacted, withhold the name of one or more of such individuals, permit the trial to proceed without the production of such evidence, and subsequently at a hearing brought by the Defendant for a new trial, come forward with an affidavit admitting that he had conferred with a member of the IRS Criminal Intelligence Section, who he previously failed to name, without destroying his credibility?

4. Is it reasonable to conclude that the taxpayer would have opened his books to everyone, since he had previously opened his books to the civil IRS auditor, where said auditor had conducted

several audits during previous years without the slightest indication of any wrongdoing by the Defendant?

5. Where no Miranda warning was ever given the taxpayer throughout the period of a civil audit, and during said period of civil audit, it was turned into a criminal audit, all prior to the final official report and recommendation of the case for prosecution, and where the Honorable Trial Judge stated in his original Decision in 1976 that the Defendant was found guilty of the alleged crime only because of the technical nature of the crime, and there was only allegedly circumstantial evidence at best, should the Defendant have been discharge and the case dismissed?

6. Where the taxpayer pursued and obtained the files under the Freedom of Information Act after judgment and discovered the withholding of exculpatory evidence by the prosecution that again would have exonerated him, discovered that

checks which a prosecution witness testified had been filled out by her with year-end dates furnished by Defendant were, in fact, blank and never filled out at all, should this evidence have been considered by the reviewing judge and the case against Defendant dismissed?

7. Is a revenue agent to be permitted to lie and deceive a federal judge, the prosecutor, and the Defendant during the original trial with his testimony to the effect that he did not contact IRS Intelligence during the course of his supposedly civil investigation, when in truth and in fact he had done so; he had discussed the case with IRS Intelligence and continued the investigation along the lines suggested by the IRS Intelligence Agent, who stated, under oath, that he knew the Defendant to be the individual under discussion with a revenue agent?

8. At the rehearing, vital records of conferences had between Revenue Agent Kelly and Special Agent Levin were discovered to have been des-

troyed by the IRS. Did not Kelly's fraud and misconduct prevent cross-examination, inspection of records never submitted by the U.S. Attorney to the Court and Defendant's counsel, impede and obstruct justice?

9. Since IRS Intelligence Agent Levin's name and records for several of the pertinent years concerning discussion had with Agent Kelly have been withheld and written records destroyed, and since the conference records made by Special Agent Levin were never disclosed by Agent Kelly until the bringing of this Motion For New Trial, approximately seven years later, isn't this conduct reprehensible and requiring dismissal of the case? Would a taxpayer be allowed to withhold evidence on a crucial point, destroy vital records, then have one key witness like Supervisor Maul testify seven years later that he has no notes or records of the case, doesn't remember the case, although he was Mr. Kelly's supervisor on the case, and further that the records have disappeared?

INDEX OF LISTING OF ALL PARTIES

All parties to this proceeding are: Sydney M. Eisenberg; Honorable Rex E. Lee, Solicitor General (Washington, D.C.); Supreme Court.

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JURISDICTIONAL STATEMENT AND STATEMENT OF FACTS

The original case was tried in the Eastern District Court of Wisconsin in 1976. New evidence was produced before the trial court and was supplemented by the IRS agent who made certain vital admissions with a decision by the trial judge in 1983 followed by an Appeal to the U.S. Court of Appeals of the U.S. Seventh Circuit signed February 15, 1984, because of an error. Correction by the Court of Appeals February 23, 1984 the Petition for a rehearing was argued November 3, 1983, and denied November 28, 1983, by the U.S. Court of Appeals.

The Court of Appeals Order of November 28, 1983 was affirmed for the reason that the District Court Order of March 17, 1983 was adopted.

Justice Stevens of the United States Supreme Court signed an Order on March 29, 1984 extending the time within which to file a Petition for a Writ of Certiorari in the instant case to and including May 15, 1984. This Appeal follows.

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A CONCISE STATEMENT OF THE CASE

This case was originated by the filing of an indictment on September 5, 1975, in three counts for willfully making and subscribing false United States Individual Income Tax Returns for the calendar years 1968, 1969, and 1971, pursuant to the provisions of Title 26, U.S.C. §7206(1).

As the trial began, Defendant moved to suppress all books and records, that had been received by Revenue Agent Terrence Kelly covering the period from 1969 to 1972 on the ground that he presented himself as a revenue agent conducting a civil suit and continued the civil audit after he had commenced a criminal tax investigation without advising the Defendant of the change of the posture of the investigation in violation of Administrative Directives of the Internal Revenue Service. At the suppression hearing, Revenue Agent Terrence Kelly testified he had no contact

during the course of his civil investigation with anyone connected with Internal Revenue Service Intelligence during the course of his civil investigation. This motion was denied.

The case originally started on June 15, 1976 (hearing on suppression going first), and continued on successive court days through June 29, 1976. Trial was had by the Court, sitting without a jury, and on June 29, 1976 Defendant was found guilty as charged and fined $3,000 as to each of Counts 1 and 3; and $1,000 as to Count 2.

Appeals from the Judgment were taken by Defendant to the Court of Appeals and United States Surpreme Court, and denied.

A motion was brought before the Trial Judge for a new trial on grounds of newly discovered evidence on January 16, 1981. Appellant believes it timely because of appeals.

Terrence Kelly was a Revenue Agent for the Internal Revenue Service, who examined the in-

come tax returns, and was materially involved in the prosecution of Defendant, signed an affidavit on January 16, 1981, admitting, for the first time, that during his auditing of Defendant he not only discussed the Eisenberg case with Group Manager Charles Howe of the Criminal Investigation Division, but also was present in a meeting with his Group Manager and IRS Criminal Special Agent Levin. Agent Levin testified the Defendant's case was discussed and instructions given. Kelly stated that the purpose of the discussion was to ascertain "affirmative factors," which constitute a firm indication of fraud. The affidavit was filed with the Court after Defendant moved for a new trial. Under oath, Kelly now admitted the previously denied meeting with Intelligence and named Simon Levin.

After being apprised of this disclosure, the Trial Court, on August 4, 1981, issued a memorandum order allowing Defendant an opportunity to argue the availability of Coram Nobis relief on the matter.

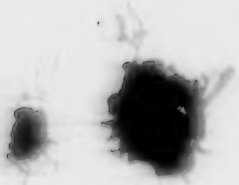
. In an order dated December 22, 1981, the Honorable Trial Judge ordered that an evidentiary hearing should be held to determine whether to issue a Writ of Error Coram Nobis pursuant to the All-Writs Section of the Judicial Code 28 U.S.C. §1651(a).

Accordingly, hearings were held May 10, May 11, June 3, June 4, 1982 by the Trial Judge.

Auditor Kelly continued a criminal investigation in the guise of a civil audit after discussing the case with Group Manager Charles Howe of the IRS Criminal Investigation Division, March 25, 1970, at Howe's office. Thereafter Kelly conferred and met with Special Agents Howe and Levin.

Auditor Kelly affirmatively misled Defendant as to the nature of the continuing investigation by never revealing his audit had changed to a criminal investigation. At the trial, Kelly originally denied having any conference with members of the IRS Criminal Intelligence Division and withheld evidence. He later admitted he was confused as to whether Defendant or the corporations owned the





stocks. Kelly, also testified at the instant hearings that he and his supervisor conferred with Intelligence Supervisor Simon Levin at a two-hour conference where he sought affirmative advice.

Most of Kelly's records were now lost as well as virtually all of Special Agent Simon's. Kelly had withheld the original records of meeting with Simon from the trial court.

Agent Kelly flagrantly violated IRS regulations which prohibited an auditor from conferring on a case with members of the IRS Criminal Section. He failed to timely refer the case for prosecution because he was continuing to amass a volume of copies of photostats of documents under the guise of a civil audit but actually simply papering the file! Other violations of the IRS rules and regulations all combined to result in Agent Kelly deceiving experienced CPA's and the taxpayer himself.

The meeting of May 24, 1971, which Auditor Kelly says was set up to obtain final answers from Applant, followed the conferences with IRS Intelligence.

The meeting was obviously a "sham," because no questionable issues were submitted. The conference came about only as a suggestion of Fred Maul, who had said he desired to be present; Maul failed to appear, obviously, because the meeting was for no purpose... The decision to indict was made before the investigation began. The testimony as to the Kelly meeting of May 24, 1971, with Defendant should be suppressed and the case dismissed because of the fraud and deception aforementioned which was praticed against Defendant. Defendant's constitutional rights were clearly violated. The IRS did not simply use a ruse to obtain evidence; it adopted perjury and destruction of records to obtain a conviction.

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ARGUMENT I. EQUITIES REQUIRE A NEW TRIAL: IRS PERPETRATED A FRAUD

IRS Civil Auditor Kelly in a suppression hearing at the original trial in 1976 was asked whether or not he conferred with any IRS Intelligence Agent. Kelly denied any such conference.

By failing and refusing to disclose Mr. Levin's name, since no one was aware of that conference, it was impossible for anyone to question Levin, check his records which were then available or verify the true facts.

Missing records of Mr. Kelly, Supervisor Maul, and Mr. Levin have all been destroyed; the Court would not order them brought in.

Defendant knew nothing about Mr. Levin until Agent Kelly provided that information in an affidavit to the U.S. Attorney seven years after the 1976 trial, in 1983, when it became apparant that Agent Kelly was going to be taken to task for his misconduct.

Appellant believes and respectifully urges the Court to conclude that not only was there a serious

technical violation of the IRS Rules, but that evidence was concealed and that collusion does definitely appear in the case so as to deceive the taxpayer hereininvolved. The IRS cannot claim a "conspiracy" at the drop of a hat, as it frequently does, and then say there was no conspiracy in the instant case.

The conspiracy involved herein was for the purpose of misleading the taxpayer and his accountants. It was the accountants who were furnishing records "willy nilly" to Mr. Kelly. The accountants stated at the evidentiary hearings that they never would have provided any records to Mr. Kelly had they known that he was working together with the IRS Intelligence. It is not merely a question of Handbook Rules at this time; it is an issue of conspiracy between IRS and the IRS Intelligence to utilize mistakes and half-truths so as to ultimately coordinate a circumstantial title case against Appellant. Lying to the taxpayer was wrong; lying to the trial judge and misleading the Defendant in

court was inexcusable and a serious out and out perjury that prejudiced the Defendant and threw off the Defendandt's thinking.

The Court himself clearly established with Mr. Kelly that Mr. Kelly never had any proof of any stock manipulation. The first time in the case Mr. Kelly admitted that he had considered and had known all the time during his investigation of Appellant that he was confused about the situation concerning stocks he admitted the money to buy the stocks came from the corporations, which permitted and authorized Appellant to buy the stock for the corporations. He said he was confused.

Since the buying of the stock issues involved were based almost completely on Mr. Kelly's testimony, Appellant can only state that it is a sad day to convict one on the word of a witness who admits his testimony was confused.

The following testimony (pp. 85, 86 of Appelant's brief) proves beyond a reasonable doubt the issue herein involved:

"Mr. Kelly further gave these answers to the following questions (Tr. 4-1-82, p. 112, line 5, through p. 113, line 20):

"Q. Now with reference to the minutes, after you talked to Mr. Levin you didn't tell anyone in the world that you had found these certificates or not certificates. Statements, from the brokers which showed either purchases or sales of the stock in question, Hercules Gallion, the Gisholt, etc., in the name of the corporation, is that right?

"A. I didn't mention that in my referral report.

"Q. But in truth, and fact there's no question but that stock was bought or sold in the name of the corporations, Prospect Heights I am talking about, or Shoreland Manor. Is that right?

"A. I didn't think it was relative to the referral.

"Q. But yet in the referral you refer to the fact, do you not, that I am unsupported, when there were written documents providing otherwise, isn't that true?

"A. With regard to the Gisholt stock we felt you were unsupported...

"Q. Even if the statement showed in black and white that they were brought or sold in the name of the corporation?

"A. There was some question in our mind as to whether or not in fact that those accounts were in the names of the corporation, but might be your accounts.

"Q. I don't follow that one. Even though it

said on top of the statement with the broker that the account was in the name of Shoreland Manor, there was a question in your mind whether even though it said Shoreland Manor it really meant Sydney Eisenberg, is that it?

"A. Because you had the authority per the Corporate Minutes to buy and sell stock within your own name. And also with the fact that you used stock that was purchased through the brokerage accounts of the various corporations to collateralize loans, personal loans of yours. There was a great deal of confusion as to which stock owned or which entity owned which stock.

"Q. Who was the confusion with?

"A. Me.

"Q. Did you ask me?

"A. No, I didn't.

There was no net worth involved in the instant case, and Mr. Kelly's testimony brought out during the hearings again proves this fact:

"Q. Is it your statement under oath that the corporation didn't own--the two corporations didn't have 250 thousand dollars worth of bonds, Government bonds that were cashed in at that time?

"A. They might have had bonds but I don't know as to how much they were.

" In Tr. 4-1-82, p. 116, he was asked the following questions and gave the following answers: (lines 14 through 19)

"Q. Are you saying under oath, Sir, that there was no bonds, no Government bonds that were freed by that refinancing?

"A. At this point something tells me that I recall something about bonds, but what the facts were with respect to those bonds, I can't tell you at this point in time."

"The complete absence of reliability or credibility of Kelly's testimony proves that there was no valid case against Defendant (Appellant). The testimony of former bookkeeper Ethel Bolden stands uncontradicted. She was in full charge of all check writing for the law office, and acted without instructions from Defendant in paying and recording the Cates bills."

It is little wonder that Agent Kelly came up to the Appellant during the hearing and stated in the Courtroom, which Defendant placed on the record that he was sorry for what he had done him.

Kelly said Defendant's name was absolutely not used. Simon Levin testified he recalled meeting Kelly and Fred Maul, and said a number of times the Defendant's name was used in the discussions concerning Defendant Eisenberg. Kelly gave one specific date of a conference with Levin. Levin gave an entirely different date for a conference; there were apparently two. Eisenberg's name was

disclosed and, in fact, known. Kelly returned to the audit, however, and obtained data on every aspect of the case.

Special Agent Howe, immediately after the referral, first assigned Agent Edward Schwalbach and then assigned Special Agent Ubellohde to the case. This is the same Mr. Howe who was in charge of Special Agent Simon Levin after March 1971, discussed the case with Kelly and Simon Levin after the referral of the case for fraud in 1972 with respect to Defendant's case. The dates of the newspaper clippings prove he never stopped working on the case. Judge Wood was looking for clear and convincing evidence that Kelly's silence as to his contacts with Intelligence was intended to mislead Eisenberg, and was fraudulent. (See his Decision of August 4, 1981). The admitted proof substantiated the fraud.

The IRS acted like a rogue elephant in this case.

II. CONCLUSIONS ARE CONTRARY TO LAW AND EVIDENCE

If this case stands as the law, IRS could openly continue with an audit to build up a case against anyone they wanted to destroy, whether a minoirty, an Anglo-Saxon Protestant, any businessman, leader, worker, or anyone in the U.S.A. Find some errors on the return, although made out by a CPA. Compile all the errors, blame them on the taxpayer, frighten him into a heart attack and stroke, (if he doesn't understand what the auditor is after, he'll frighten), run around the neighborhood telling his friends he is a tax cheat, accumulate thousands of photostatted business records, and infer in the courtroom to everyone that he is a "con" artist. The IRS conduct in this case was completely uncalled for in a civilized society.

Intelligence Agent Levin was the supervisor in the Intelligence Department. He definitely established clearly, succinctly, tersely, and without any question that the meeting between Kelly, his supervisor, Maul, and Intelligence Agent Levin was

not simply a hypothetical conference where the name of the taxpayer was not mentioned. He stated without equivocation, that Appellant was mentioned during the course of the conference. If Mr. Kelly comes out of this case convincing the Courts that there was no nefarious misconduct, it is contrary to the testimony of Supervisor Simon Levin:

"Tr. 6-3-82, p. 173, lines 13 through 23; p. 174, lines 1 through 4):

"Q. Now during the course of that discussion do you recall the name of the taxpayer being mentioned at any time?

"A. It may have been mentioned at the end, Yes. It may have been. I do know that this transaction did involve Mr. Eisenberg, Yes.

"Q. You say that you know it involved Mr. Eisenberg. How do you know that?

"A. It's the Eisenberg case.

"Q. Well, ---.

"A. I think his name was mentioned at the end of the proceedings, the conference that we had...

"Q. Is it possible his name was not mentioned?

"MR. EISENBERG: That's objected to now.

"THE COURT: He's already said a couple times he thought it was mentioned at the end. I sustain the objection.

"He stated further information provided to him. (Tr. 6-3-82, p. 174, lines 5 through 17):

"Q. What exactly was it that you told Fred Maul and Terry Kelly in response to their statements to you?

"A. The only thing is I asked them if they had all the details of the checks, dates, the dates cancelled, bank records showing what they related to or whatever testimony they needed, statements as to the nature of the checks from the people involved and the same thing regarding the stock transactions that they ahd all the documents necessary to refer it and the statements as to what transactions involved. Just to make sure they had enough for referral.

"On November 16, 1972, Simon Levin had another meeting with Kelly and Special Agent Howe. (Tr. 6-3-82, p. 177, lines 17 through 24):

"Q. Can you tell me what was discussed at this--- or what was discussed with Revenue Agent Kelly and Group Supervisor Howe at the November 16, 1973 meeting?

"A. I don't remember this discussion at all but there should be a memo in the file. It says here I prepared a memo on assignment of the Eisenberg case. Had a discussion with T.A. Kelly and G.S. Howe. So there should be a memo in the file.

"The pre-referral meeting with Maul and Kelly, of September, 1970, was designated 'case development,' and covered two hours. (Tr. 6-3-82, p. 180, lines 15 through 21)."

With reference to the question of improper delay on referral from Civil to Intelligence, Appellant

maintains that in the instant case the file was "papered over" by placing thousands of exhibits in the record for no purpose other than to creat confusion. Appellant did not try the case against him, or even understand it. He did not sit with his counsel. His counsel maintained there was no case against him, and did not place on the stand Defendant, or his witnesses, who were in the courtroom ready to testify.

Taxpayer and his public accountants should be given the Miranda warning the day the IRS civil accountant first begins his civil audit. The fact is there is no longer any civil audit if this decision is adopted.

The Honorable Trial Judge was constrained to comment in his decision: "Agent Maul's memory was remarkably unpersuasive." ... "Special Agent Levin's recollection of the 'hypothetical' approach claimed to have been used was no more than a subterfuge to avoid the restrictions but possible with a little less strain on the conscience..."

III. IT WAS ERROR TO PREVENT DEFENDANT FROM EXAMINING FILES

After or during these hearings, some records were left with the Clerk of District Court by the U.S. Attorney; they were open to the public. Appellant believes he is entitled to examine these records. They were open to the public, and any confidentiality, if such was claimed, were therefore waived. This was another reason this case should be reversed.

IV. PROSECUTION VIOLATED U.S. CONSTITUTION

Kelly's undisclosed contacts validate Defendant's claim that material evidence was obtained by deception inviolation of the Fourth and Fifth Amendments. Auditor Kelly was assigned to and did provide vital data to IRS Intelligence in pursuit of a path of criminal investigation. The Kelly violations were deliberate, prejudicial, and serious. In the trial of Defendant, Kelly concealed the truth as to his contacts with Intelligence. His conduct in obtaining thousands of records were fraudulent.

The Audit Technique Handbook For Internal Revenue Agents, §19(91)(2) specifically provides: "After

an agent discovers the possible existence of fraud he must decide when to suspend his examination and prepare his referral report." §10(91)(7) requires that an agent not discuss taxpayer's case with Intelligence prior to the submission of the referral report.

V. IRS CRIMINAL AGENTS SHOULD NOT IMPERSONATE IRS CIVIL AUDITORS

Kelly was doing more than performing an audit after his conference with Howe and Levin. He was using photostat equipment in Defendant's CPA Levine's office at Defendant's expense. He had been requested by Defendant to let him know of any errors found. But under guise of a friendly audit, he followed a pattern of criminal investigation. In our case, the IRS Auditor was a double agent, namely an Auditor and an Intelligence Agent. Permitting this conduct would probably stop most civil audits, and is inexcusable. But lying to the Trial Court is inexcusable.

The coordinator on case development against the

Defendant, the person who was determined to "get" Defendant, regardless of violation of the Audit Technique Regulations by the Internal Revenue Agents and constitutional rights, was IRS Intelligence and Criminal Section Group Manager Charles Howe. It was he who told the incredulous story of finding a file designated as "Sydney Eisenberg"; it has no reference to any fees, any monetary considerations whatsoever, nothing that would involve income taxes in any way, shape, form or manner. Charles Howe could not explain how his assignment memorandum on Sydney M. Eisenberg was blank as to most of one of the pages. Certainly, any reasonable person would assume that vital and pertinent information had been eliminated. More lies. He admitted contacting Auditor Kelly and receiving audit information on the two admitted conferences on March 25, 1979, and July 8, 1970. Kelly obtained information that Howe needed.

VI. IRS USED INTIMIDATION, DESTRICTIVE TACTICS

Auditor Kelly was placed inside for the team. He provided the falsehoods and violated the rights of

the taxpayer by claiming to proceed on an IRS audit of tax records. He was audacious and ruthless because he had the IRS Criminal Section to back him.

Mr. Howe and Mr. Kelly both disregarded the rights of the taxpayer in several respects. Government Exhibit 17, The Audit Technique Handbook For Internal Revenue Agents, specifically provides:

"Procedure After Discovering Indications of Fraud 10(91)(6): "...The agent should bear in mine that he is not, at this point, building a fraud case against the taxpayer..."

Subsection (7) provides:

"It is important that potential criminal cases be handled properly by the agent. The agent should not discuss the taxpayer's case with Intelligence prior to submission of the referral report. After the referral report is submitted there shall be no further contact with the taxpayer until the referral is either accepted (in which case the special agent should be present) or declined."

"10(92)(5): "The agent is again reminded that although he should be certain that his suspicions concerning fraud are warranted, he should guard against proceeding too far in developing the fraud aspects of the case."

Also 10(90)(3):

"On the other hand, if the agent extends his examination too far before submitting his referral report he may be doing unnecessary work. The

special agent who will come into the case later may find it necessary to repeat some of the work previously done in order to document evidence required in a criminal case. Also, the overextension of the examination may jeopardize criminal prosecution by giving the taxpayer a basis for claiming that the criminal case was substantially built by the revenue agent under the guise of making an audit for civil tax purposes."

Government Exhibit 6, so-called "hypothetical," is headlined, "Facts." On pages 5 and 6 of that document, Mr. Kelly states:

"My Conclusions. 1) All the transactions the taxpayer had involving the above mentioned stock would indicate that he owned the stock 2) The statements made by the corporation's accountant completely contradicts the statements made in the corporate minutes. I wonder when the minutes were actually adopted!! 3) By transferring the gain to the corporation there was a substantial tax savings. However, the taxpayer continued to have complete and full use of the proceeds from the sale. 4) Other than the letter from the account and the corporate minutes, which are both self serving, there is no attainable information to indicate that the stock was owned by anyone other than the taxpayer. 5) It is my opinion that the idea of transferring the stock to the corporation developed after the sale of the stock. When the taxpayer realized that he would have a large tax liability, he decided to transfer the stock to the corporation."

His "conclusions" prove that Kelly had concluded he had a fraud case September 21, 1970, as well as on March 23, 1970. But he continued his investigation for fraud from March 25, 1970, to the date trial in June, 1976.

VII. KELLY INTENDED TO OBTAIN FINDING OF GUILTY ALTHOUGH DEFENDANT WAS NOT.

July, 1970 Howe decided to have Kelly continue obtaining all the information, and in September his associate, Intelligence Officer, Mr. Simon Levin, urged Kelly to proceed with prosecution. On June 29, 1979, Intelligence received a copy of the Referral Report For Potential Fraud Cases from Kelly. June 29, 1981 was more than nine months after the September 21, 1970 conference between Maul, Kelly and Simon Levin.

Agent Kelly is discredited in the face of all the contradictions by other witnesses. The Trial Court's decision does not consider that Kelly abused the constitutional rights of the Defendant. Kelly's credibility has been destroyed by himself, as well as his own associates.

Kelly admitted at the rehearing his original premise was questionable.

Charles Howe recommended that no further action be taken by the Intelligence Division after July 9, 1970. He also told the Court that the file was closed, although that was not what he had written in his memorandum. Nevertheless, attached to the memorandum are clippings, eight pages, entitled "Intelligence," showing publication dates of July 25, 1969; July 30, 1969; August 1, 1969; August 2, 1969; August 6, 1969; August 13, 1969; March 16, 1970; May 14, 1970; November 3, 1970; November 4, 1970, December 17, 1970; December 19, 1970; January 5, 1971; April 29, 1971. All the clippings with dates after July 9, 1970 prove that Charles Howe did not tell the truth when he stated that he recommended no further action be taken by Intelligence Division July 9, 1970. (Government Exhibit 27)

Mr. Howe's own records prove he continued to develop the fraud case at all times, and parti-

cularly while Auditor Kelly was his "front man." Mr. Kelly falsified his answers because he knew that his relationship with Charles Howe was illegal. The case before the Department of the Treasury, Complainant 78-6, entitled, "Director of Practice v. Sydney M. Eisenberg," held December 19, 1978 contains the following on pages 141 and 142: (Answers by Kelly)

"My question is this: You told the Judge that the first time that you went to Intelligence was when?" You tell the Judge about me.

"A. It was shortly after I referred the case or my report, my referral report to the Intelligence Division regarding yourself.

"Q. When, what year?

"A. It would be in 1971, in June of '71.

"Q. That is not the truth. That is what you said before. Is that the truth or not the truth?

"A. The first time?

"Q. Yes.

"A. To the best of my recollection, that is the truth.

"Q. Isn't it the truth that you talked to Charley Howe when he called you in, in March of 1970, yes or no? Very simple.

"A. No.

"Q. And if Charley Howe were to say that, that would be a lie, is that right?

"A. That he called me in?

"Q. Yes, you bet.

"A. That, I stand on my answer.

"Q. That he would be lying?

"A. This is correct.

Furthermore, the Audit Technique Handbook For Internal Revenue Agents also provides, represented by Government Exhibit 17, in 10(86):

Conduct of Revenue Agents (n) A revenue agent should always be impartial in his official capacity. He must not be influenced by political, racial or religious considerations. He must so conduct himself as to make it apparent to all persons connected with the case that his investigation is completely impartial."

The conduct of Mr. Howe was in complete disregard of this section of the Audit Technique Handbook For Internal Revenue Agents. The dates of the clippings prove they were not all in his file February, 1970.

One has only to look at the many newspaper clippings attached to his July 9, 1970 memo-

randum to prove also that his Criminal Section was not impartial in their official capacity, but was influenced by political, racial, or religious considerations. Some clippings involve stories concerning the Defendant, who was reportedly critical of a Milwaukee Sentinel reporter in his treatment of a sitting Judge. The reporter was accused by Defendant of Anti-Semitism according to a reprint clipping from the Sentinel August 1, 1969, the file referred to Special Agent Howe. Why did Howe collect a clipping that inferred Defendant was Jewish? The clippings are full of free speech arguments raised by American Civil Liberties Union. The newspaper simply sought to shift the blame for the suicide of a Judge from a vicious, untruthful newspaper reporter who lied when he told the Judge he was being removed, in order to evoke a reaction from the Judge that he could point, to Defendant and his son, when it was clearly established in hearings before a Referee appoin-

ed by the Wisconsin Supreme Court who took testimony over a long period of time to determine what had happened, that Defendant had done nothing whatsoever wrong. The Wisconsin Supreme Court reviewed Referee Young's findings and reversed, but Referee Young saw and heard the witnesses testify. Defendant's religion entered the case August 1, 1969 through that clipping.

It is now apparent that we have the "smoking gun" linking the tax case directly to the newspaper reporter's misconduct. Charles Howe provides the "missing link," whereas Terrence Kelly and Ubbelohde are part of the Howe "Gang Busters" team. Howe continued accumulating the newspaper stories from July 24, 1969 through April 29, 1971. (Gov. Ex. 27) IRS Intelligence never left the case. The IRS Intelligence used psychological warfare with its tactics. The IRS Criminal Section representative Howe was influenced by political and religious considerations. Why else was the Anti-Semitic clipping

included? The IRS representatives continued attempting to "get" Defendant. They so conducted themselves as to make it apparent to all persons connected with the case that their investigation was completely partial.

The timing of Intelligence Criminal Division Howe and Kelly's audit farce on Defendant must also be noted. As the clippings indicate, the audit and its criminal aspect was developed at the same time that the professional conduct case was proceeding on a complaint filed by the Board of State Bar Commissioners, the chairman, of which, at that time, was W.A. Boardman, a lobbyist for the Newspaper League, dominated by The Milwaukee Journal. Reference to the complaint by the State Bar Commissioners is contained in the news clipping with publication date of March 16, 1970, attached to the memorandum of July 9, 1970. Neither the newspaper nor the IRS intended to give Defendant time to tell how the newspaper staff had "polished off" the Judge, and why they did it to him. Kelly co-

ordinated his investigation with the newspaper clippings' dates. Defendant could spend no time on the audit. He had to rely on the CPAs and bookkeepers. IRS knew this.

The clipping of March 16, 1970 states that there was no professional misconduct on the part of Defendant in the eyes of Referee Professor George Young, former Dean of the University of Wisconsin Law School, who filed such conclusions with the Wisconsin Supreme Court as the result of a long inquiry he conducted into the charges.

So Charles Howe proceeded with a case study to "get" the Defendant. With the many transactions Defendant was involved, Kelly sought to find possible areas of conflict in accounting thinking, or bookkeeping mistakes. Not everyone agrees on everything. Howe's July 9, 1970 memorandum was retrieved under the Freedom of Information Act, with the IRS numbers: 070 and 002-071. Nowhere did the legislators who passed the income tax laws ever expect the IRS to become a super police power with the right to tread violently on

the constitutional rights of taxpayers. The line of demarcation between Auditors and Intelligence Agents would be completely eliminated.

The fraud and deception practiced by Auditor Kelly on Defendant continued into the trial itself. At the trial Kelly stated he had only two conversations by telephone only with Howe. The impression was that Special Agent Howe simply wanted to know through two telephone calls whether Kelly was auditing taxpayers. Howe firmly testified there were two conferences actually held in his office. Kelly reported his findings and thereafter continued on the case. Kelly thereafter sought guidance from Criminal Division Head Simon Levin on September 21, 1970. Kelly says he knew it was wrong to use taxpayer's name in an attempted hypothetical question, so he did not. Agent Simon Levin, as a segregated witness, says definitely that this is not true. The Eisenberg name was used. The case was clearly the Eisenberg case. Kelly's story was destroyed.

Clearly, the Maul, Kelly, Levin conferences were all part of the criminal case development, case originating with Special Agent Howe, joined in by Kelly and guided by Simon Levin and Fred Maul. The time was charged up to "case development," and Mr. Simon Levin told the simple, unvarnished truth, knowing that his daily written report verified the facts as he told it.

Charles Howe became Simon Levin's supervisor in March, 1971, and there were discussions from time to time with the agents in one group about various cases (Tr. 6-3-82, p. 192, lines 2 through 5 and lines 21 through 25):

"Q. We have that clear?

"A. Yes, I was transferred out of the group supervisor's slot in March, '71 and then Charles Howe became supervisor. And I was under his supervision...

"Q. Now you say there were discussions from time to time with the gentlemen that were in one group about various cases as well as with the supervisor, right?

"A. On occasion there would be some discussion. But nothing of consequence."

Simon Levin stated it was contrary to the rules and not "cricket" to have somebody in the Audit Section get information for the Intelligence Section (Tr. 6-3-82, p. 197), lines 19 through 25; p. 198, lines 1 and 2).

Mr. Kelly's deception and untruthfulness is clearly demonstrated from the answers he gave to counsel for the Defendant before the Court at the initial trial on June 14, 1976, at 9:30 a.m. (Tr. 6-14-76; p. 52, lines 1 through 19):

"Q. Now, during the period from April 1st, '70 to June of '71--

"A. Excuse me, Sir. I beg your forgiveness. I have the '71 time reports here. I was looking at the '70. And we do have the time that I spent through the date of the referral. All right. From April 1st of '70--well, from April 1st or the 23rd when I was reassigned to the Milwaukee District, I spent 825 hours on the case.

"Q. From April 23rd '70 to June 30th?

"A. No, until June 4th.

"Q. Oh, 800--

"A. And 25 hours.

"Q. During that period did you talk with any other Special Agents other than Mr. Howe?

"A. I did not.

This direct statement of Mr. Kelly that he did not talk to any other Special Agents other than Mr. Howe, prejudicously misled the Court and counsel at the time of the trial.

VIII. PERJURY OF AGENT KELLY WAS SERIOUS; CONDONATION OF KELLY'S PERJURY IS ASTONISHING AND AMAZING; IT DESTROYS DEFENDANT'S RIGHT TO LEGAL PROCESSES.

The following questions By the Court and answers prove that Mr. Kelly was aware of his misconduct. (Tr. 6-14-76; p. 49, lines 24, 25; p. 50, lines 1 through 18):

"Q. You're admonished by the manual, are you not, that 'the overextension of the examination may jeopardize criminal prosecution by giving the taxpayer a basis for claiming that the criminal case was substantially built by a Revenue Agent under the guise of making an audit for civil purposes.' You're aware of that?

"A. Yes.

"Q. And are you also aware that, "The agent should not discuss the taxpayer's case with Intelligence prior to the submission of the referral report. After the referral report is submitted there should be no further contact

with the taxpayer until the referral is either accepted or rejected?'

"A. That is correct.

"Q. And we are talking about the period April 1st, 1970. And when did you draft your referral report?

"A. My report was sumbitted on June 24th, 1971.

IX. AGENT KELLY "AFFIRMATIVELY MISLED" DEFENDANT AS TO THE NATURE OF THE CONTINUING INVESTIGATION.

Agent Kelly admittedly met with Special Agents Howe and Levin, but never indicated or told taxpayer or his representatives of his determination to seek a criminal investigation. He was not interested in an accounting. He was interested only in effectuating a criminal prosecution. By obtaining a plethora of records he sought to mislead the Court, and succeeded, since the Court found a number of mistakes constituted "circumstantial evidence" although made by the accountants, not the defendant.

Agent Kelly affirmatively misled the Court by claiming errors were made by Defendant personally, knowing that Defendant never even saw any books.

Previous yearly audits had been resolved with no fraud claims; minor tax adjustments and good relationships had been established between Kelly and previous IRS auditors and Defendant's accountants and bookkeepers before Kelly was contacted by IRS Intelligence.

CPA Edward Gilman, called as a defense witness, testified he took the corporate books and records, took trial balances, determined adjusting entries where needed, prepared income tax returns, reconciled bank accounts, made journal entries and closing statements. He first discussed income tax returns with Kelly in late 1970 and early 1971. He had cordialities with Kelly, who discussed the two corporations, the work papers, talked about Gilman's children, running the books and two corporate records. (Tr. 6-4-82; p. 87, lines 2 through 19). They looked at records; Gilman answered questions.

Kelly, during the period from February, 1970, never said he was making an investigation in conjunction with IRS Intelligence. Had Gilman known

he said, counsel would have been sought immediately. He told Defendant to engage counsel after the case was referred June 30, 1971, and Attorney Lipton was engaged. (Tr. 6-4-82; p. 87, line 20 through p. 89, line 10).

CPA Levine testified he first saw Kelly in the late 1960's when Kelly was auditing Defendant's records. Kelly was given a desk in Defendant's office. Mr. Levine testified that if Kelly had said he was in communication with IRS Intelligence pertaining to bookkeeping Levine "would have told you to get an attorney and not have me handle it." (Tr. 6-4-82; p. 139, lines 6 through 9). CPA Levine said he assumed Kelly wanted the photostatic record for his file to back up any assessments.

During the period referred to as in parenthesis, February, 1970 to June 30, 1971, Kelly was given by Levine everything he wanted: cancelled checks, bank statements, notes, journals and bookkeeping records. (Tr. 6-4-82; p. 144, lines 11 through 22).

After being informed by Mr. Schwalbach that the

matter had gone to Intelligence, Levine says Mr. Lipton was retained and he took them away from CPA Levine to Mr. Lipton's office. Mr. Lipton told CPA Levine not to discuss the matter with anyone. (Tr. 6-4-82; p. 146, lines 3 through 6). Agent Kelly never paid CPA Levine for all the photostating he did for Kelly. He showed Kelly how to use the machine and told him to copy anything he wanted to. CPA Levine testified he made year-end entries for Defendant, and Mr. Gilman did this for the two corporations.

CPA Levine remembered Mr. Kelly asking all the questions contained in Exhibit 7, signed by Fred Maul, entitled "Terry," dated September 23, 1970. Levine discussed the questions with Kelly, including stock purchases and minutes, losses and profits on stocks. (Tr. 6-4-82; p. 160, lines 2 through 24). Levine remembered telling Mabel to make sure she vouchered all the 1971 invoices as of December 31, 1971 and not to get any '72 invoices mixed in with the '71 invoices. He told Mabel that she could not change the system.

. CPA Levine had a discussion with Kelly where he told Kelly that IRS had "okayed the system;" the adjustments for both personal and corporate entries and the Cates bills were also discussed with Kelly. (Tr. 6-4-82, p. 165, line 4, through p. 166, line 8; p. 167, line 1 through p. 169, line 17; p. 170, line 1 through 18; p. 177, line 9 through 25; p. 172, line 1 through 13).

CPA Levine testified that Mabel Peterson made mistakes. Interest reported three months later were covered in an amended return for 1970, and Levine said he discovered the mistake. (Tr. 6-4-82; p. 201, line 25.) Mr. Levine discussed 1970 bookkeeping with Mr. Kelly. (Tr. 6-4-82; p. 202, line 4 through 14).

Mabel Peterson complained to CPA Levine of spending too much time on Kelly's work requests during the time frame involved, so that she could not do her own work. She had to work hours overtive. (Tr. 6-4-82; p. 211, line 6 through 21). Kelly, through Gilman and Levine, kept Mabel Pe-

terson busy from his first conference with Howe in March 1970 through June 1971.

The extent of the duplicity and deception practiced by Mr. Kelly is exemplified in these questions and answers (Tr. 5-10-82; p. 128; line 5 through 11):

"Q. Now my original statement to you was that I would tell Mr. Levine to give you anything you wanted in the way of investigation because I was convinced you were going to tell me if there was anything wrong. Do you recall that?

"A. Is this back in June of '69?

"Q. Yes.

"A. I believe that's correct."

While Kelly does not recall what Mr. Howe told him in March of 1970, it is clear as to what Kelly did, and that was Mr. Howe's investigative work. Kelly's notes on those conferences were missing at the rehearing.

X. AGENT KELLY'S DECEPTION TAINTED THE PHYSICAL OR TESTIMONIAL EVIDENCE ADDUCED AT TRIAL.

The conference of May 24, 1970 between Agent Kelly, CPA Levine and Defendant never would have

taken place if deception had not been practiced. Kelly says there was a meeting in September, 1970 between Maul, Kelly and Simon Levin, and not in January, 1971. Mr. Levin's records for 1970 have been destroyed by IRS, and could be examined at the rehearing, notwithstanding the fact the Defendant under the Freedom of Information Act, 5 U.S.C. §554(a)(3)(b) made a demand to the United States Department of Justice, Tax Division, to see all tax data, records, information, June 22, 1979. All fees were paid. There is no excuse for this destruction of records under the circumstances. It further tained this case.

In his investigation after the Simon Levin conference Kelly must have learned of the corporate U.S. Government Bonds which Defendant claims, when added to refinancing proceeds, equaled stock purchases. (Tr. 4-1-82; p. 117, line 15 through 20):

"Q. My question is now you do remember that there were bonds, Government bonds that were three percent or something like that?

"A. Yes, I recall something. I believe that there

were some bonds involved. As to the nature and to the extent of them, I don't recall it."

But until now, Kelly never told the court he knew of the bonds, which explains most of the sources of the stock purchases and would have cleared Defendant.

Mr. Kelly also obtained information, fully tainted, as portrayed in the following answers to the following questions. (Tr. 4-1-82; p. 126, line 16 through p. 128, line 2). Physical evidence became fully tained. Wholly-owned corporations obtained refinancing funds. (Tr. 4-1-82; p. 55, lines 19 through 25). Mr. Kelly stated that there was approximately $147,000 available to buy stock from the refinancing. (Tr. 4-1-82; p. 56, line 13 through 19). The Court was apparently for the first time in this case advised that the two properties, namely the Prospect Heights building and the Shoreland Manor building, had been assigned to Defendant personally. Thus, no taxes were due on any stock purchases.

The Defendant personally made the mortgage and the money was available to him personally.

Mr. Kelly testified this had presented a confusing situation to him. (Tr. 4-1-82; p. 160, line 8 through through 24). Mr. Kelly said he was faced with a "dilemma. It might be legal or it might be illegal." The Giddings & Lewis sale that had been made in 1965 involved only $14.18 capital loss. The sale of Giddings & Lewis stock, for the sum of $178,000, took place in 1967. (Tr. 4-1-82; p. 63, line 6 through 18). It was not 1968, in the years involved in this case. (Tr. 4-1-82; p. 63, line 19 through 21).

Mr. Kelly conceded that if Defendant made a mortgage and spent the money that he got from the mortgage there was no tax due on the money. (Tr. 4-1-82; p. 67, line 1, 2, 3):

"Q. In other words I made a mortgage and spend the money I get from the mortgage, there's no tax due on that is there?

"A. No. I would say no at this point."

Following the meeting with Mr. Simone Levine, Supervisor Maul told Mr. Kelly to "trace the actual stock purchases, where did funds originate to pay

for stock," and suggested getting the loose ends above tied up in Exhibit 6. He said after that was done Mr. Maul and Mr. Kelly could visit Defendant and ask for explanations. The answer received would determine whether there was to be a referral. Mr. Kelly interpreted this as "determining as to the facts relating to the facts on the Gisholt stock." In answer to questions, the following was stated (Tr. 4-1-82;p. 72, line 23 to p. 73, line 8):

"Q. Okay. So if the funds came from the property, it was possible to assume that wherever the money was invested that that investment belonged to the property, is that correct?

"A. To the corporations that owned the property.

"Q. Yes, okay. Now the minutes which you referred to concerning the right to act for the corporation and buy stock for the corporation including stock that was to be bought, the Gisholt which became Giddings and Lewis was in--was prepared or obtained by you so that you could put it in your file, is that right?

"A. That is correct."

Mr. Kelly condeded that Defendant personally kept no records whatsoever. Furthermore Defendant acted legally.

Then followed these astonishing questions of Ke-

lly and answers. (Tr. 4-1-82; p. 96, line 25 through p. 97, line 1 through 17):

"Q. Now it was clear too then that if I had the power to act on behalf of the corporation, that the minutes also gave me the right to put the stock in my own name?

"A. That is correct.

"Q. Okay. You talked about that with Mr. Levin?

"A. Yes, we pointed that out to him.

Mr. Kelly was so anxious to get a conviction because of the tremendous number of hours he had wasted on the investigation that he withheld from the Court information helpful to the Defendant.

"Q. (of Mr. Kelly) Now with reference to the stock purchases then, you went back and saw that there were statements that were made out to Shoreland Manor, for example, by the brokers with reference to -- I will go further -- International Products, which became Ogden?

"A. There were other concessions entered into by the corporations.

"Q. Now when you had the stock purchases that were made prior to '68 you knew, did you not, that the minutes had to be made out prior to '68, because the stock purchases were in the names of the corporations, isn't that right?

"A. No, that's not correct. Because I didn't receive that information with respect to the corpor-

ations brokerage accounts until after September of 1970.

"Q. I agree, you saw it after September. But why didn't you call it to the attention of Mr. Levin, and why didn't you call it to the attention of anybody when you saw that there was actual proof that the minutes had been supplemented by action?

"A. I didn't think that it was relevant that those -- when I referred the case, then the case became that of the Intelligence Division.

Obviously, withholding the truth at the trial prohibited Defendant from examining Kelly's records which are now missing. The referral for prosecution statement was fraudulent, seriously affecting constitutional rights.

XI. LAW ON SUBMECT OF WRIT OF CORAM NOBIS.

The law on the subject of Coram Nobis, pursuant to All Writs of the Section of the Judicial Code 28 U.S.C., §1651(a), provides that "courts have a solemn duty to ferret the allegations for symptoms of constitutional infirmities..." this Court stated in his Decision of September 22, 1981.

It is interesting that not until the Court considered permitting evidence to be adduced that evi-

dence relied upon at the trial may have been obtained in violation of the Fourth and Fifth Amendments rights that IRS Revenue Agent Kelly came forward with his affidavit stating that he had discussed the case with IRS Intelligence Agent Levin.

In the instant case, a Writ of Coram Nobis should issue because all the vital evidence would have safeguarded Fourth and Fifth Amendment rights, as well as for the reason that the movant was be innocent. Moon v. United States, 272 Fed. 2d 530, 532 (D.C. Cir. 1959) and People v. Calero, 258 N.Y.S. 2d 207 (1965).

The prime interest in the Federal Courts for the Writ of Error Coram Nobis has come about as a result of increased concern for the due process requirements of the United States Constitution. In 1935, the United States Supreme Court, in Mooney v. Holohan, 294, U.S. 103, 74 L.Ed. 791, 55 SCt. 340 (1935), held that to insure due process to a person convicted of a crime some method must be made available to that person to enable

him to attack his conviction on the grounds of due process after the time for taking appeal or other relief had passed. In Mooney v. Holohan, supra, the Court held that a conviction that did not afford the accused due process would not be sustained merely because no other remedy was available to the accuesed to vindicate his rights. The Supreme Court found that the Writ of Error Coram Nobis corresponded to the type of relief they comtemplated a need for in Mooney v. Holohan, supra, and the said Writ was employed for this purpose.

Subsequently, in 1954, the United States Supreme Court, in United States v. Morgan, 346 U.S. 502, 98 L.Ed. 248, 74 S.Ct. 247 (1954), held that "The All Writs" section of the Judicial Code, 28 U.S.C. §1651(a) conferred on the federal courts specifically the power to employ a Writ of Corma Nobis.

The Supreme Court also held, in Morgan, supra, that the use of Coram Nobis in federal courts was not precluded by the Habeus Corpus provisions of the judicial code. This is in contradication to

the assertion made by the Government in its brief that the nature of the Coram Nobis remedy parallels that of Habeus Corpus.

While not on the subject of Coram Nobis, in the case of U.S.A. v. Roosevelt Oliver, an appeal from the U.S. District Court for the Eastern District of Wisconsin, designated as Case No. 73-1699 in the Court of Appeals for the Seventh Circuit [decided October 31, 1974] certain portions are pertinent. Oliver was indicted for understating his gross income from trafficking in narcotics. Oliver was questioned by IRS Intelligence Agents without being given a warning as required by Miranda (384 U.S. 436) and Dickerson (413 Fed. 2d 1111):

"...prescribed warnings are required if the defendant is in custody or otherwise deprived of his freedom of action in any significant way." ...

The Oliver, supra, case says:

"...the test serves the purpose of determining when the necessary process has begun, when the investigative machinery of the government is directed toward the ultimate conviction of a particular individual, and when therefore the suspect should be advised of his rights."

In the Dickerson, supra, case:

"...the commencement of controversary proceedings began not by taking him into custody, but by the IRS assigning the matter to the Intelligence Division, it had commenced the preparation of its criminal case." ...

The Oliver, supra, case further held:

"As we emphasized in Dickerson, one purpose of the Miranda warnings is to make sure that the defendant does not misapprehend the nature of his obligation to respond to the revenue agents' inquiries. In this case, the warnings did not include that he could have a lawyer present during the interview. Under these circumstances we believe Miranda requires us to treat his disclosures as though they were compelled during the course of an adversary proceeding, and therefore inadmissible at this criminal trial." ...

XII. KELLY STOPPED AT NOTHING TO CONVICT DEFENDANT ALTHOUGH DEFENDANT HAD DONE NOTHING WRONG.

After conferring with IRS Intelligence Group Manager Howe, followed by the now admitted and proven conference with IRS Special Intelligence Group Manager Simon Levin, Kelly proceeded to contact Defendant's CPAs' Levine and Gilman. Following guidelines suggested by Intelligence Agent Levine from September, 1970 to June, 1971, Kelly spent 88 hours in September; 40 hours in November;

.126 hours in December (all in 1970); in 1971 he spent in January, 117 hours; February, 80 hours; April, 32 hours; June, 131 hours; total 709 hours. (Government Exhibit 24)

Throughout the investigation, IRS Intelligence collected newspaper clippings. Kelly denied collecting any articles pertaining to Defendant (tr. 6-14-76; p. 52, line 17, 18, 19); but in his referral report Kelly refers constantly to matters which could only have been obtained from newspaper articles. It is safe to assume that the clippings provided the data which is in Kelly's referral report. The clippings, from September, 1970 to June, 1971, are dated as follows: November 3, November 4, November 5, November 17, November 18, November 21; December 17, December 19, (all in 1970); January 5, and April 29, 1971. (Government Exhibit 27)

Defendant's constitutional rights were violated when judged by the Roosevelt Oliver standards applied to an IRS audit.

XIII. THE NEED FOR INQUIRY INTO PROSECUTORIAL SUPPRESSION AND IMPROPRIETY IS CRITICAL IN THE INTEREST OF JUSTICE.

Judge Friendly perhaps stated it most succinctly in the landmark case of United States v. Keogh, 391 F. 2d 138, 147 (CA 2d 1967), when he wrote:

"Prosecutorial misconduct is presumably infrequent; to invalidate convictions in the few cases where this is proved, even on a fairly low showing of materiality, will have a relatively small impact on the desired finality of judgments and will deter conduct undermining the intergrity of the judicial system."

The record is clear that at trial Kelly testified to the effect that after he discovered inconsistencies in the taxpayer's returns he called in the Intelligence area of the Internal Revenue Service to determine criminal issues. This "story" began to change as he testified at disciplinary hearing brought againt taxpayer by the Treasury Department. Therein, Kelly testified that he had several meetings with agents of the Intelligence area prior to his referral. That Judge informed him that was not the way it was suppose to work; he reconstructed his testimony.

Attempts to get the diaries of Kelly and the other agents were blocked by the prosecutor and the Internal Revenue Service, although the Trial Court's previous order directed all information of this nature be examined.

The Courts of this country have applied various tests in determining when it is necessary to order a new trial due to prosecutorial improperiety. Convictions must be set aside if there is "any reasonable likelihood" that the false testimony could have affected the judgment. Mooney v. Holohan, supra. The standard to be applied is based on the three-tiered formula found in United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed. 2n 342 (1976).

It is obvious that a finding of such impropriety would, in most instances, favor dismissal or a new trial if the interests of justice are to be served. U.S. v. Keogh, supra.

In Judge Wood's Order of August 4, 1981, he specifically stated:

"Therefore, the government is directed to be prepared to produce the above named IRS personnel, together with all relevant records for examination by the court and parties on an early date to be determined."

During the trial it is significant that the prosecution refused to produce all relevant records, as requested. Was the Court justified in denying the production of such records?

XIV. CONCLUSION

Defendant respectfully requests that upon all the records, exhibits and testimony in the instant case Defendant has produced sufficient evidence to warrant that a Writ of Error Coram Nobis be issued pursuant to the Judicial Code 28 U.S.C. §1651(a). A new trial could be granted. The judgment should be vacated on all three counts under the circumstances. There is no basis for prosecution; no credible witnesses, no criminal intent.

In examination of the Trial Court's opinion, namely, his Memorandum Order signed March 17, 1983, insofar as any evidence of wrongdoing on

the part of taxpayer is concerned references is made to a transaction which occurred in 1967. The years of the indictment did not include the year 1967. As a matter of fact, the one stock known as the "Gisholt" or "giddings and Lewis" stock, was bought from a stockbroker in the name of a corporation and sold in the name of said corporation. The Trial Court now said "...It can be seen that there are some inconsistencies in the government's evidence..." This finding appears to be an understatement, since Special Agent Levin testified directly against the testimony of Agent Kelly, and Agent Kelly now has no testimony whatsoever to support his version. Kelly in fact has been totally discredited by his words, his conduct, and his admission stated in his affidavit.

The IRS never claimed there was a deliberate understatement of income, and no attempt was ever made to proceed on the basis of a net worth. The reason is clear. The three returns, in fact, overstated the net income and there was no

evidence of understating.

On page 15 of the Memorandum Order, the Court says Agent Kelly..."never did find a badge of fraud...:

The Court in his opinion stated on page 14:

"This view of the evidence and its consquences does not result in approval of the conduct of IRS personnel in avoiding their own rules. If IRS is to scrutinize the most personal affairs of citizens, it should be able to withstand scrutiny itself. The conduct of IRS, no matter how well intentioned it may have been in the pursuit of possible wrongdoing, was, to say the least, very disappointing under any version of the evidence."

"All we have left in this case at this point is still just a technical violation of the administrative guidelines of IRS, but a more serious technical violation than was originally known to this court."

The fact is no money whatsoever was taken out and hidden. The books reflected every asset and this so-called "false return case" was so weak that at the original trial the defense counsel didn't interpose any defense; he moved for acquital.

The new evidence covered every aspect of the case, and there was nothing left in the case revealing any wrongdoing. The U.S. Assistant Attorney further filed with the Clerk's office certain files

which were then open to the public. When the Defendant attempted to look at these records, the Trial Judge proceeded to examine them in camera, and ordered them returned to the U.S. Attorney without permitting defense to examine. This ruling was prejudicial. Certainly, Judge Wood is an honorable man, but even the worthiest of people can be misled.

On page 16 of the Memorandum Decision, the Court remarked that the hearing came close to a retrial of the entire case.

We submit that the rehearing proves Defendant guilty of no wrongdoing.

Dated at Milwaukee, Wisconsin May 11, 1984.

P.O. ADDRESS:

1131 West State Street
Milwaukee, WI 53233
Tel:(414)271-0931

Respectfully submitted,

Sydney M. Eisenberg

SYDNEY M. EISENBERG, PRO SE
Petitioner

OPINIONS IN CASE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, Plaintiff, v. SYDNEY M. EISENBERG, Defendant	Dated: Mar. 17, 1983. No. 75-CR-136

MEMORANDUM ORDER

Mr. Eisenberg filed a motion for a new trial on June 2, 1980 based on allegations of newly discovered evidence. That was about two years after his conviction had been affirmed by the United States Court of Appeals, Seventh Circuit, and the mandate had issued. After a hearing, that motion was denied as untimely in a Memorandum Order on August 4, 1981. It further appeared, in any event, that the evidence relied upon in support of the motion did not qualify as newly discovered. However, so much of Mr. Eisenberg's untimely motion as raised a question about Revenue Agent Terrence Kelly's contacts with the IRS Intelligence Division prior to referral was excepted from the denial. At the court's suggestion on December 22, 1981 in a modification of its

previous order, this remaining segment of the motion was pursued as a motion for coram nobis relief as that procedure would be outside the time fetters of Rule 33 of the Federal Rules of Criminal Procedure. An evidentiary hearing was ordered. Approximately a week of testimony and arguments was heard in an extensive examination of this issue. Mr. Eisenberg, a trial lawyer of broad experience, insisted upon proceeding pro se, although he had been represented by counsel at trial. There can be little left to add to the record in this case.

The genesis of this remaining issue occured just prior to the bench trial in 1976. Agent Kelly, the case agent, testified at a suppression hearing concerning two telephone contacts he had with Group Agent Howe of the Intelligence Division, the first on March 25 and the second on July 8, 1970, both prior to the referral to Intelligence. After considering that testimony the court denied the motion to suppress on the basis that the

contents of the two brief telephone conversations were inadequate to demonstrate that Agent Kelly and Intelligence had secretly transformed his civil audit into a criminal investigation under the direction of the Intelligence Division without advising Mr. Eisenberg of the change in its character.

The issue, however, was resurrected after the trial and during the time Mr. Eisenberg's new trial motion was pending. The government filed an affidavit by Agent Kelly substantially enlarging his prior testimony. Agent Kelly, by the affidavit, revealed for the first time that in addition to the two brief telephone contacts that he and his unnamed group manager also had discussed with an unnamed special agent of the Criminal Investigation Division at an unspecified time a "hypothetical set of facts" developed during the civil investigation which related to Mr. Eisenberg. The purpose of that meeting, it was explained in the affidavit, was to ascertain what "affirmative factors" would con-

stitute a firm indication of fraud in the particular circumstances. It was further stated that at no time during that Civil-Intelligence discussion was Mr. Eisenberg's name disclosed. That late disclosure raised numerous questions reflecting upon Agent Kelly's credibility and the civil-criminal internal IRS relationship as it was brought to bear upon Mr. Eisenberg. Those questions prompted this court to direct the government to produce the pertinent witnesses and documents. The United States Attorney's office has fully assisted in the endeavor to resolve this coram nobis hearing, Agent Kelly explained that it was at that point in the suppression hearing that he intended to bring to the court's attention the additional Intelligence contact. Since part of the focus of the suppression hearing was on those contacts, Agent Kelly, if what he claims now is true, should have indicated again to the court that his response was still incomplete, or he should have advised the Assistant United States Attorneys trying the case that he needed to return to the stand to clarify his responses

on an important matter. He did neither.[1] / There is no suggestion in the record that the United States Attorney's Office was aware of the third contact prior to January, 1981 and the filing of Agent Kelly's affidavit. Had the court or any of the attorneys sensed that there might be a critical omission in Mr. Kelly's testimony, this time-consuming subsequent hearing six years later could have been avoided. The facts are now much more difficult to determine with confidence. Nevertheless, that factual determination has to be undertaken.

During the time of the audit activities in question, the agents were to be guided by the then current "Audit Technique Handbook for Internal Revenue Agents" That manual clearly restricted cooperation between revenue agents and special agents during the civil audit prior to referral to Intelligence. The manual in general provided that the revenue agent should not discuss the taxpayer's case with Intelligence

1/ The government argues that defendant's attack on the integrity of Agent Kelly is ironic since it was Agent Kelly who precipitated this issue by advising the Assistant United States Attorney in January, 1981 that the "hypothetical meeting" had occured. Agent Kelly, it is said, did so in order to "lay our cards on the table." Those cards, as they are called, should have been shown at the suppression hearing.

prior to referral. There was no exception for contacts between a revenue agent and an intelligence agency on a so-called hypothetical basis or otherwise. The government finds some solace in the fact that at least the manual contained no express prohibition of "hypothetical" contacts. However, "hypothetical" contacts were plainly prohibited by the all-inclusive prohibition. The agents evaded the provisions of their own manual as some citizens do their income taxes. Only the factual nature and extent of that violation remains to be determined before coram nobis law is applied. Some additional background review is needed.

On September 5, 1975 the defendant, Sydney M. Eisenberg was indicted on three counts of

willfully making and subscribing a false individual income tax return for the years 1968, 1969, and 1970 in violation of Title 26, U.S.C. § 7206(1). Prior to trial, the defendant moved to suppress all books and records reviewed by Agent Kelly from 1969 to 1972. During a pretrial hearing on the Motion to Suppress, Agent Kelly testified that prior to his referral of the Eisenberg case to the Intelligence Division of the IRS, he had two conversations with a group manager in the Intelligence Division who was inquiring about the status of the case. The group manager involved, Charles H. Howe, testified at the suppression hearing that when he became a group manager in January, 1970, there was an open "case development" file on Sydney Eisenberg, Special Agent Howe testified that in accordance with routine procedure, he requested the tax returns of Mr. Eisenberg. In response to his request, Special Agent Howe was advised that the tax returns were assigned to the Audit Division.

Special Agent Howe also testified that he then contacted the Audit Division, found out that Agent Kelly was assigned to the case, and inquired of Agent Kelly on two occasions, March 25 and July 8, 1970, as to the status of the case. Special Agent Howe further testified that after the second conversation with Agent Kelly, he closed the case development file in the Intelligence Division. This is supported by Government Exhibit No. 27, Special Agent Howe's Memorandum. Following the pretrial hearing on the Motion to Suppress, the court denied the defendant's motion, ruling that although the pre-referral conversations between Agent Kelly and Special Agent Howe may have been a technical violation of the administrative regulations, there was no prejudicial collusion involved.

Following a bench trial, Mr. Eisenberg was found guilty as charged on all three counts. The defendant's post-trial motions were denied on December 10, 1976. The conviction was then affirmed by the United States

Court of Appeals, Seventh Circuit, in an unpublished order, 567 F.2d 391, and certiorari and rehearing were denied by the Supreme Court, 435 U.S. 995 and 436 U.S. 951.

On June 2, 1980, Mr. Eisenberg filed his motion for a new trial based on his claim of newly discovered evidence. On January 16, 1981, the government filed a brief in opposition to that motion. Appended to the government's brief was the affidavit of Agent Kelly in which he revealed the additional contact which gave rise to this proceeding.

The court in 1982 then held an exhaustive hearing on the nature and significance of the pre-referral contacts including in particular the previously unrevealed third contact that Agent Kelly had with the Intelligence Division. Agent Kelly, his former group supervisor, Agent Maul, Criminal Intelligence Division group managers Special Agent Charles Howe and Special Agent Simon Levin, and Mr. Eisenberg's accountants, Edward Gillman and Burton Levine, testified.

Agent Kelly testified that in addition to the two conversations he had with Special Agent Howe, there was also a third contact, a pre-referral meeting attended by Agent Kelly, Agent Fred Maul (Kelly's supervisor at the time and now retired), and Simon Levin (a group manager from the Intelligence Division and also now retired). Based upon his review of his work papers, Agent Kelly testified that the meeting occurred on or about September 21, 1970. Agent Kelly testified that other than the two telephone conversations with Howe and the meeting with Agent Maul and Special Agent Levin, there was no other pre-referral contact with the Intelligence Division.

Agent Kelly explained that the meeting was held in order to obtain some clarification of the significance of a complicated stock transaction of Mr. Eisenberg. Government Exhibits 6 and 7, the original longhand notes of Agents Kelly and Maul respectively prepared at the time, bear out the narrow

focus of the joint Civil-Intelligence session. The stock in question was Gisholt, also known as Giddings and Lewis. In 1967, Mr. Eisenberg had sold the Gisholt stock and realized a $73,000 profit, it was claimed, but had not reported the profit on his 1967 return. The complexity arose, according to the testimony, because there were contradictory indications as to whether the stock was owned by Mr. Eisenberg or whether it was owned by corporations in which he was the sole shareholder. Agent Kelly further testified that the meeting with Special Agent Levin lasted approximately one hours, that it concerned only the Gisholt stock, that Mr. Eisenberg's name was never mentioned, and that no work papers bearing Mr. Eisenberg's name were shown to Special Agent Levin during the meeting. Agent Kelly further explained that the consensus reached at the meeting was that there was insufficient information to draw any conclusion as to the ownership of the

Gisholt stock. Agent Kelly also testified that Special Agent Levin did not give any directions or suggestions as to how the civil audit was to be conducted nor was any understanding reached with Special Agent Levin regarding subsequent meetings.

Agent Kelly testified that after the meeting with Special Agent Levin, the audit of Mr. Eisenberg continued. According to Agent Kelly, during the balance of the civil audit, little or no progress was made on the Gisholt issue, but other items which he considered suspicious were discovered in Mr. Eisenberg's books and records. On May 24, 1971, Agent Kelly interviewed Mr. Eisenberg, and because Mr. Eisenberg was unable to satisfactorily explain the suspicious items to his satisfaction, Agent Kelly referred the case to the Intelligence Division. In his testimony, Agent Kelly, also expressed the opinion that the meeting with Special Agent Levin did not, in any way, affect the manner or direction of

his continuing audit of Eisenberg.

Agent Maul testified that he had no recollection of any meeting that he and Agent Kelly may have had with Special Agent Levin in 1970 or 1971. Agent Maul testified, however, that during the course of his career in the IRS, he did, on one or two occasions, have meetings with Intelligence personnel in which cases were discussed on a hypothetical basis. Agent Maul further testified that the purpose of such meetings was to ascertain whether a "badge of fraud" had been uncovered in a particular audit. Although Agent Maul had no recollection of the hypothetical meeting in the Eisenberg case, he testified that in such a hypothetical meeting, he would not, under any circumstances, have revealed the name of the taxpayer nor would he have shown the Intelligence Division person any documents or books revealing the name of the taxpayer. Agent Maul also testified that if,

during a hypothetical meeting, a Special Agent or group manager in Intelligence had rendered the opinion that a case should be referred to Intelligence, Agent Maul, as a supervisor, would not have authorized a Revenue Agent to continue the audit. Agent Maul's memory was remarkably unpersuasive. Although Mr. Eisenberg was well known generally in the community and had receive extensive publicity, Agent Howe had no recollection of anything about the Eisenberg case or of even having heard of Mr. Eisenberg.

Special Agent Levin's recollection of the hypothetical meeting was in several respect[s], at variance with the recollection of Agent Kelly. First, based on an office diary entry, Special Agent Levin rendered the opinion that the hypothetical discussion probably occurred on January 15, 1971. According to Special Agent Levin, there were two principal items discussed at the meeting: checks charged to

interest expense at the end of the year which were not used in payment of interest for quite a number of months, and some possibly fraudulent stock transactions. Special Agent Levin further testified that he advised Agents Maul and Kelly that the case potentially involved fraud and should be referred to Intelligence for joint investigation. Special Agent Levin also believed that Mr. Eisenberg's name may have been mentioned at the end of the meeting. Special Agent Levin did not recall any specific requests made of him by Agents Maul or Kelly. In addition, Special Agent Levin testified that following that conversation, he did not in any way monitor the progress of the civil audit and was of the opinion that he had no other pre-referral contact with Agents Kelly and Maul regarding the Eisenberg case. Special Agent Levin further testified that in the course of his employment as a Special Agent and a group supervisor in Intelligence,

hypothetical discussions with Revenue Agents or group managers in the Audit Division occurred as a "normal routine thing," but that the taxpayer's name was sometimes mentioned in such a discussion.

Special Agent Charles Howe testified that the only two pre-referral contacts he had with anyone in the Audit Division regarding the Eisenberg case were the conversations in March, 1970, and July, 1970, which he had testified to during the pretrial hearing. Special Agent Howe further testified that during the course of those two conversations, Agent Kelly did not ask for any direction from Special Agent Howe as to how the audit should be conducted nor did Special Agent Howe volunteer any suggestions as to how the audit should be conducted. That testimony is not open to question.

From those factual highlights, it can be seen that there are some inconsistencies in the government's evidence, which after eleven

years is not surprising. Special Agent Levin was of the opinion that his meeting with Agents Kelly and Maul was not concerned solely with hypothetical matters as Mr. Eisenberg's name was probably mentioned. Special Agent Levin also differed as to what was discussed. According to his recollection, stock transactions and manipulation of interest expense were discussed in contrast to Agent Kelly's testimony that only Gisholt stock was discussed. Special Agent Levin also differed with Agent Kelly as to whether the case was ready for referral at that time. Special Agent Levin was a convincing, responseive witness, but contrasted with the other testimony and fortified by the exhibits the court finds that the events were as testified to by Agent Kelly, the most knowledgeable witness about the details of the Eisenberg case. Special Agent Levin's knowledge of additional items may be attributed to knowledge of the case after the matter was referred to Intelli-

gence. This choice is made despite the reflection upon Agent Kelly for delay in revealing the controversial contact with Intelligence, and in spite of some possibility that Agent Kelly was biased in defending his own conduct.

The choice between the testimony of Agent Kelly and Special Agent Levin is not critical however. There is no hint anywhere in the evidence of actual fraud, trickery or deceit by any of the revenue agents involved. Under the plain language of the prohibitions contained in the manual then in effect, even if mention of Mr. Eisenberg's name had been scrupulously avoided, that would not have cured the manual violation. The "hypothetical" approach claimed to have been used was no more than a subterfuge to avoid the restrictions, but possibly with a little less strain on the conscience. The limited scope of the subjects touched on at the Civil-Intelligence [session] is also not critical, nor is the

question about when the case was ready for referral. Even looking at the evidence and resolving its conflicts as might appear to be most favorable to Mr. Eisenberg, the questionable conduct of the agents in not by itself of such character as to undermine the conviction.

There is no indication that Intelligence secretly entered the investigation to trick or mislead Mr. Eisenberg into revealing incriminating evidence not otherwise available to the revenue agent. Much of the evidence, as for example, the corporate books and records, were subject to compulsory process. Agent Kelly made no actual misrepresentations to Mr. Eisenberg to gain any admissions or obtain otherwise unavailable evidence. Agent Kelly continued with his investigation, but with only some possible minor peripheral help that may have come out of the Intelligence meeting. That meeting produced nothing of

consequence. Mr. Eisenberg, to his credit, never obstructed the investigation. He made his employees and books available and always appeared willing to discuss his affairs with the revenue agent when necessary. His attitude did not change significantly even after a special agent entered the investigation. Mr. Eisenberg's cooperation continued. He has continually maintained his innocence claiming there was nothing to hide. If Mr. Eisenberg had had notice of the involvement of Intelligence, and would as a result [sic] withheld some bit of significant evidence, it has not been made known what that evidence was. No prejudice to Mr. Eisenberg can be identified. In any event, Mr. Eisenberg, an experienced trial lawyer, then licensed to practice before the IRS, cannot claim to not have been aware of the risk involved while undergoing an audit, whether a special agent appears or not. Even an ordinary, average taxpayer not knowledgeable in these tax

matters is considered to have some elementary understanding of the possible consequence of a civil audit.

> A "routine" tax investigation openly commenced as such is devoid of stealth or deceit because the ordinary taxpayer surely knows that there is inherent in it a warning that the government's agent will pursue evidence of misreporting without regard to the shadowy line between avoidance and evasion, mistake and willful omission.
> . . . .
> Moreover it is unrealistic to suggest that the government could or should keep a taxpayer advised as to the direction in which its necessarily fluctuating investigations lead. The burden on the government would be impossible to discharge in fact, and would serve no useful purpose.

United States v. Sclafani, 265, F. 2d 408 (2d Cir.), cert. denied, 360 U.S. 918 (1959).

This view of the evidence and its consequences does not result in approval of the conduct of IRS personnel in avoiding their own rules. If IRS is to scrutinize the most personal affairs of citizens, it should be

able to withstand scrutiny itself. The conduct of IRS, no matter how well intentioned it may have been in the pursuit of possible wrongdoing, was, to say the least, very disappointing under any version of the evidence. It was not so unworthy, however, in its adverse effect upon Mr. Eisenberg's trial that it serves to undermine the bench trial verdict.

All we have left in this case at this point is still just a technical violation of the administrative guidelines of IRS, but a more serious technical violation than was originally known to this court. That violation, however, is not enough. In United States v. Mapp, 561 F.2d 685, 690 (7th Cir. 1977), it was held that the IRS rules, being for the internal administration of the service and not for the protection of the taxpayer, confer no rights on the taxpayer. This particular issue will not be expected to arise under the present IRS guidelines as they now

permit limited Civil-Intelligence contact for specific advice on a "type of case," although not referred to as a hypothetical discussion. That does not necessarily constitute collusion to deceive the taxpayer.

Nor do the circumstances suggest that there was improper delay in referral from Civil to Intelligence. As soon as a revenue agent discovers "firm indications" of fraud, meaning more than a suspicion, the civil examination is to be suspended without explanation to the taxpayer and the matter referred to Intelligence. The regulations however, permit the revenue agent to perfect the "indications of fraud" and to develop them sufficiently to form the basis for a sound referral. This obviously allows for a good bit of good faith discretion on the part of the revenue agent. Unless the revenue agent abuses that discretion, courts are reluctant to second-guess the agent. United States v. Meier,

607 F. 2d 215, 217 (8th Cir. 1979), cert. denied, 445 U.S. 966 (1980). The burden was on Mr. Eisenberg to show that any undue delay in referral was deliberately done for an improper purpose, to his prejudice. United States v. Tweel, 550 F.2d 297, 299 (5th Cir. 1977). There was no abude of discretion on Agent Kelly's part in completing his investigation so as to be able to supply Intelligence with sufficient information to permit an informed decision on whether or not to pursue the case as a criminal investigation. United States v. Mapp, 561 F.2d at 690. Mr. Eisenberg's financial affairs were complex and involved, and required considerable work to determine if there was a deliberate understatement of income.

Agent Kelly testified that in the Gisholt refinancing transaction, the subject of the third Civil-Intelligence meeting, he never did find a "badge of fraud." Mr. Eisenberg, who

defends that transaction, cannot consistently claim that Agent Kelly should have early recognized firm indications of fraud. An early and undeveloped referral to Intelligence would not have aided Mr. Eisenberg. It would merely have more fully informed Intelligence about Mr. Eisenberg's financial activities, and likely resulted in the matter being referred back to Agent Kelly for further work. When, at the end of the civil audit, Mr. Eisenberg failed, in the view of IRS, to give satisfactory explanations for the various items developed at trial, the case was properly referred to Intelligence.

There is no clear and convincing evidence that there was a "sneaky, deliberate deception by the agent," constituting a flagrant disregard by the agent of the taxpayer's rights, as contrasted with the situation in United States v. Tweel, 550 F. 2d at 299. The factual circumstances in Mr. Eisenberg's case do not justify an examination of the

numerous suppression or Miranda warning cases arising from a multitude of circumstances.

This remaining remnant of Mr. Eisenberg's case has revolved around the question of whether or not the unrevealed violation of the IRS guidelines by the agents constituted a fraud upon the court so as to render Mr. Eisenberg's conviction invalid. As explained in United States v. Scherer, 673 F. 2d 176, 178 (7th Cir. 1982), coram nobis relief is not available for every error discovered after judgment. It is, rather, an "extraordinary remedy" reserved to correct errors of the most fundamental character that render the proceeding irregular and invalid. It is generally presumed that proceedings resulting in a conviction are correct. Mr. Eisenberg bears the burden of demonstrating that "the asserted error is jurisdictional or constitutional, [and] involves an error of law

that results in a complete miscarriage of justice." United States v. Morgan, 346 U.S. 502, 512 (1954). This has not been accomplished by Mr. Eisenberg in spite of the irregularities in the internal handling by the IRS. Although this extended hearing came close to a retrial of the entire case, nothing can be found which justifies disturbing the trial verdict.

Certain files were recently discovered in the Clerk's Office, and a controversy arose as to whether they were court records available to Mr. Eisenberg or office files of the United States Attorney. They have been examined in camera and are determined to be office files of the United States Attorney. Therefore, the files are being returned directly to the United States Attorney.

All remaining issues are resolved against Mr. Eisenberg and the application for coram

nobis is denied

Dated this ____ day of _____, 1983.

/s/

Harlington Wood, Jr.
United States Circuit Judge
sitting as United States
District Judge by designation

UNITES STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
ARGUED: NOVEMBER 3, 1983
November 28, 1983
Before
Hon. WALTER J. CUMMINGS, Chief Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. ROBERT J. KELLEHER, Senior District Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee,	Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 83-1560 vs.	
SIDNEY M. EISENBERG, Defendant-Appellant.	75 CR 136 Harlington Wood, Jr., Judge.

O R D E R

The judgment of the district court is hereby AFFIRMED for the reasons stated in the district court's memorandum order of March 17, 1983. A copy of the district court's order which we adopt is attached hereto as the Appendix.

* The Honorable Robert J. Kelleher, Senior District Judge of the Central District of California, is sitting by designation.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
(CORRECTED: Feb. 23, 1984)
February 15, 1984

Before
Hon. WALTER J. CUMMINGS, Chief Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. ROBERT J. KELLEHER, Sr. District Judge*

United States of America, Plaintiff-Appellee	) Appeal from
No. 83-1560	) the United
	) District
vs.	) Court for
SIDNEY M. EISENBERG	) the East.
Defendant-Appellant	) Distr. of
	Wisconsin
	75 CR 136
	Harlington Wood, Jr., Judge

ORDER

On consideration of the petition for rehear- and suggestion for rehearing en banc filed in the above-entitled cause by defendant-appellant Sidney M. Eisenberg, no judge in active service** has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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*The Hon. Robert J. Kelleher, Sr. Distr. Judge of the Central District of California, is sitting by designation.

**The Hon. Harlington Wood, Jr., Circuit Judge, did not participate in the consideration or decision of this petition for rehearing en banc

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

March 29, 1984

Mr. Sydney M. Eisenberg
1131 West State Street
Milwaukee, WI 53233

Re: Sydney M. Eisenberg v. United States No. A-778

Dear Mr. Eisenberg:

Your application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on March 28, 1984, signed an order extending your time to and including May 15, 1984.

A copy of the Justice's Order is enclosed.

Very truly yours,

Alexander L. Stevas, Clerk

By: /s/
Katherine Downs
Assistant Clerk

gtb
Enc.
cc(letter only): Hon. Rex E. Lee, Solic. Gen.
Clerk, U.S. Court of Appeals
for the Seventh Circuit
(your No. 83-1560)